

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

NUCLEAR WATCH NEW MEXICO,

Plaintiff,

v.

Case No.: 1:22-cv-00680-GJF-JHR

**NATIONAL NUCLEAR SECURITY
ADMINISTRATION OF THE U.S.
DEPARTMENT OF ENERGY**

Defendant.

FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

Introduction

This is a lawsuit seeking the release of all of the National Nuclear Security Administration's (NNSA's) full and complete FY 2019 Performance Evaluation Reports (PERs).

1. This action is brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking injunctive relief and other appropriate relief, the immediate processing and release of records sought by Plaintiff, Nuclear Watch New Mexico (NWNM), from Defendant, National Nuclear Security Administration of the Department of Energy, through a FOIA request ("Request") made by NWNM on January 27, 2020. The Request sought the Defendant's full and complete FY 2019 PERs. Separately, outside of NWNM's FOIA request, Defendant did release related cursory FY 2019 Performance Evaluation Report Summaries and Fee Determination Letters that lack the sufficient degree of detail that the full and complete PERS provide and the public is entitled to.

2. After acknowledging the Request, Defendant's last communication to Plaintiff was on February 6, 2020, which asserted that the Request was "still open" and was "being processed."

Plaintiff has received no communications from Defendant since and has received no documents responsive to the Request.

3. The Request is of vital importance: it concerns the Defendant's upkeep and oversight of U.S. nuclear weapons research and production sites. American citizens have the right to know how our nation's nuclear weapons facilities are being run and maintained.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction over this action and personal jurisdiction over Defendant pursuant to 5 U.S.C. § 552(a)(4)(B), (a)(6)(E)(iii), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701-706.

5. Venue is premised on the place of business of NWNM as well as the place of business of the NNSA and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

6. Plaintiff Nuclear Watch New Mexico is a project of the Southwest Research and Information Center, a non-profit, tax-exempt, public policy research and information environmental organization based in Albuquerque, New Mexico. NWNM makes information available to thousands of citizens by means of its numerous and varied publications, educational programs, and public-interest litigation. Obtaining information about governmental activity, analyzing that information, and widely publishing and disseminating it to the press and the public is a critical component of NWNM's work.

7. Defendant National Nuclear Security Administration is a semi-autonomous agency within the Department of Energy created by Congress in 1999. The Department of Energy is a governmental agency within the meaning of 5 U.S.C. § 552(f)(1).

Factual Background

8. Nuclear Watch New Mexico and other citizen organizations have a consistent record of filing FOIA requests for NNSA's annual Performance Evaluation Reports. In March 2012 NWNM initiated FOIA litigation against Defendant to obtain the full FY 2011 Performance Evaluation Reports for all NNSA sites. After NWNM filed suit, the Defendant, within three working days, began honoring its obligation to release full and complete Performance Evaluation Reports. In December 2019, Defendant again began withholding the full and complete PERS and instead began releasing only inadequate 3-4 page summaries. NWNM, therefore, with its Request demanded, for all NNSA sites, the full and complete FY 2019 PERS which Defendant had unlawfully withheld.

9. The requested documents contain Defendant's evaluations of the performance of the contractors at each NNSA site and are the bases upon which NNSA decides award fees and contract extensions.

10. After NWNM filed its FOIA request on January 27, 2020, three other organizations (the Oak Ridge Environmental Peace Alliance, Tri-Valley CAREs and Savannah River Site Watch) also filed FOIA requests to Defendant for the same documents.

11. As stated above, Defendant has not provided any documents responsive to the Request, more than two years after claiming that the Request was still "being processed," an unlawful delay under FOIA.

Nuclear Watch New Mexico's FOIA Request

12. NWNM specified that its request "was for all NNSA FY 2019 Performance Evaluation Reports (PERS)," which "would include, but not be limited to, FY 2019 PERs on contractor

performance at the Los Alamos National Laboratory, Sandia National Laboratories, Lawrence Livermore National Laboratory, the Pantex and Y-12 Plants, the Savannah River Site, the Kansas City Plant, the Nevada National Security Site, the Office of Secure Transportation, the MOX Fuel Fabrication Facility, etc.” [emphasis in original Request]

13. The Request provided hyperlinks to examples of previously-disclosed complete PERs, Performance Evaluation Report Summaries, and Fee Determination Letters.

14. The Request provided answers to six questions that the NNSA usually asks inquirers of those submitting FOIA requests, including, inter alia, whether the requested concerns the operations or activities of the government, whether the disclosure is "likely to contribute" to an understanding of government operations or activities, contributions to the general public, etc.

15. The Request also sought waiver of search, review and duplication fees on the basis that disclosure of the requested records is in the public interest because it “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); see also 28 C.F.R. § 16.11(k)(1).

NNSA’s Response

16. On January 30, 2020, NNSA FOIA Specialist Kristen Duran contacted NWNM and stated that “[t]he information you are requesting can be found at the following link:

<https://www.energy.gov/nnsa/leadership-and-offices/acquisition-and-project-management>.” Ms.

Duran stated further that “[b]ased on the public availability of the requested information on NNSA’s website, your request (FOIA 20-00073-KD) is now closed.”

17. On January 31, 2020, NWNM replied to Ms. Duran and stated that the documents found at the hyperlink she provided only included FY 2019 Performance Evaluation and Measurement

Plans (PEMPs). NWNM stated further that "the NNSA response to my FOIA request is entirely non-responsive and I strenuously object to its closing."

18. On February 6, 2020, Ms. Duran replied that the Request was "still open and being processed." Ms. Duran stated further that the NNSA was conducting "additional research regarding the publication of the PER's," and stated that she would "be in touch shortly."

19. To date, NWNM has had no further communications from Ms. Duran or the NNSA and has received no documents responsive to the Request.

Causes of Action

20. Defendant has demonstrated a chronic pattern of not honoring its obligation to release full and complete Performance Evaluation Reports. It took a citizens' FOIA lawsuit to compel NNSA to release its full and complete FY 2011 Performance Evaluation Reports, which the agency honored until FY 2019. This complaint seeks to rectify that renewed illegal behavior and enforce citizens' right to know.

21. Defendant's failure to make a reasonable effort to search for records sought by the Request violates the FOIA, 5 U.S.C. § 552(a)(3).

22. Defendant's failure to promptly make available the records sought by the Request violates the FOIA, U.S.C. § 552(a)(3)(A).

23. Defendant's failure to make the requested full and complete Performance Evaluation Reports available for public inspection in an E-FOIA reading room as "Frequently Requested Documents" violates the FOIA, U.S.C. § 552(a)(2)(D)(ii).

Prayer for Relief

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Order Defendant to immediately to produce all records responsive to NWNM's

Request of January 27, 2020;

B. Enjoin Defendant from charging Plaintiff search, review, or duplication fees for the processing of the Request;

C. Order Defendant to immediately make the requested full and complete FY 2019, 2020 and 2021 PERS, for all NNSA sites, available to the public under “Frequently Requested Documents” in its E-FOIA Reading Room, in addition to the existing Summaries of the 2019, 2020 and 2021 PERS and Fee Determination Letters that NNSA has already posted there;

D. Order Defendant to post future full and complete Performance Evaluation Reports in its E-FOIA Reading Room as “Frequently Requested Documents;”

E. Award Plaintiff its costs and reasonable attorney’s fees incurred in this action; and

F. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

JULES ZACHER, P.C.

By: /s/ Jules Zacher
Jules Zacher
1601 Walnut St. #707
Philadelphia, PA 19102
(215) 988-0160

STROUD LAW OFFICE

By: /s/ John Stroud
John Stroud
8 Azul Way
Santa Fe, NM 87508
(505) 670-5639

Counsel for Plaintiff Nuclear Watch New Mexico